

Hon. Hon. Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

MARK HOFFMAN, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

HEARING HELP EXPRESS, INC.
TRIANGULAR MEDIA CORP.,
LEADCREATIONS.COM, LLC and
LEWIS LURIE,

Defendants.

CASE NO. 3:19-cv-05960-MJP

**DEFENDANT HEARING HELP
EXPRESS, INC.'S ANSWER AND
AFFIRMATIVE DEFENSES TO
PLAINTIFF'S SECOND AMENDED
COMPLAINT – CLASS ACTION**

Assigned to the Hon. Marsha J. Pechman

Defendant Hearing Help Express, Inc. ("Defendant") hereby answers the Second Amended Complaint ("SAC") (Dkt. No. 45.) of Plaintiff Mark Hoffman ("Plaintiff"), as numbered herein, and asserts affirmative defenses to the SAC as follows below.

ANSWER

In responding to the SAC, Defendant denies all allegations contained therein unless specifically admitted below.

DEFENDANT HEARING HELP EXPRESS, INC.'S
ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFF'S SECOND AMENDED COMPLAINT - 1
No. 3:19-cv-05960-MJP
113461.00602/123824025v.2

VAN KAMPEN & CROWE PLLC
1001 Fourth Avenue, Suite 4050
Seattle, Washington 98154-1000
(206) 386-7353

I. NATURE OF ACTION

1. From at least May through September 2019, Mark Hoffman received telemarketing calls on his cellular phone placed by or on behalf of Hearing Help Express, Inc. seeking to sell their hearing aid products to him.

ANSWER: Defendant admits only that it placed calls to Plaintiff in 2019 after his information was transmitted to Defendant from co-Defendants Triangular Media Corp./LeadCreations.com, LLC (“Triangular” and “LeadCreations,” respectively). Triangular and LeadCreations provided assurances to Defendant that Plaintiff had given his consent to be contacted by Defendant. To the extent not expressly admitted, the remaining allegations are denied.

2. The calls were placed using an automatic telephone dialing system (“ATDS”) in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. (“TCPA”).

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, denied.

3. Triangular Media Corp. (which is owned and operated by Lewis Lurie) and related company, Leadcreations.com, initiated some of the telemarketing calls to Mr. Hoffman until June of 2019. Triangular and Leadcreations.com initiated these calls itself or through a call center that it retained to place the calls.

ANSWER: Defendant lacks knowledge regarding the allegations in this paragraph and therefore is unable to admit or deny. To the extent a response is required, denied.

4. After receiving the calls from Triangular and Leadcreations.com, Mr. Hoffman received ATDS calls from Hearing Help Express, Inc. directly.

1 **ANSWER:** This paragraph consists of legal conclusions as to which no response is required.
 2 To the extent a response is required, denied. By way of further response, Plaintiff's information
 3 was transmitted to Defendant from co-Defendants Triangular/LeadCreations. Triangular and
 4 LeadCreations provided assurances to Defendant that Plaintiff had given his consent to be
 5 contacted by Defendant. As to the remaining allegations, Defendant lacks knowledge regarding
 6 the allegations in this paragraph and therefore is unable to admit or deny. To the extent a
 7 response is required, denied.

8 5. Mark Hoffman has not been a Hearing Help Express, Inc. customer at any time,
 9 and Mark Hoffman did not consent to receive calls from Hearing Help Express, Inc., Lewis Lurie
 10 or their agents. Mark Hoffman's telephone number is listed on the Do Not Call registry
 11 maintained by the Federal Trade Commission and has been continuously listed there since
 12 August 21, 2009.

13 **ANSWER:** This paragraph consists of legal conclusions as to which no response is required.
 14 To the extent a response is required, denied. As to the remaining allegations, Defendant lacks
 15 knowledge regarding the allegations in this paragraph and therefore is unable to admit or deny.
 16 To the extent a response is required, denied.

17 6. Plaintiff brings this class action for damages and other equitable and legal
 18 remedies resulting from Defendants' violations of the TCPA.

19 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
 20 the extent a response is required, denied.

21 **II. JURISDICTION AND VENUE**

22 7. This Court has original jurisdiction over Plaintiff's TCPA claims pursuant to 28
 23 U.S.C. § 1331, because they present a federal question.

1 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
2 the extent a response is required, Defendant admits that this Court has subject-matter jurisdiction
3 over Plaintiff's TCPA claims pursuant to 28 U.S.C. § 1331. To the extent not expressly admitted,
4 denied.

5 8. This Court has personal jurisdiction over Hearing Help Express, Inc., Triangular
6 Media, Leadcreations.com, and Mr. Lurie because they initiated the calls to Plaintiff's cellular
7 phone. Plaintiff's cellular phone uses a Washington area code and was, at all relevant times,
8 located in Washington.

9 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
10 the extent a response is required, denied.

11 9. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial
12 part of the events and omissions giving rise to Plaintiff's claims occurred in this District.

13 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
14 the extent a response is required, denied.

15 **III. PARTIES**

16 10. Plaintiff Mark Hoffman resides in Kitsap County, Washington.

17 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
18 therefore is unable to admit or deny. To the extent a response is required, denied.

19 11. Defendant Hearing Help Express, Inc. is an Illinois corporation with headquarters
20 in Dekalb, Illinois.

21 **ANSWER:** Admitted.

22 12. Defendant Leadcreations.com, LLC is a Florida limited liability company with its
23 principal place of business in Florida. Leadcreations.com engaged in telemarketing conduct in
24 this district for, or together with, Triangular Media in order to market Hearing Help products.

1 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
2 therefore is unable to admit or deny. To the extent a response is required, denied.

3 13. Defendant Triangular Media Corp. is a Florida corporation with its principal place
4 of business in Florida. Triangular engaged in telemarketing conduct in this district and others
5 throughout the nation in order to market Hearing Help products.

6 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
7 therefore is unable to admit or deny. To the extent a response is required, denied.

8 14. Defendant Lewis Lurie is the owner and operator of Triangular Media.

9 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
10 therefore is unable to admit or deny. To the extent a response is required, denied.

11 15. Under the TCPA, an individual such as Mr. Lurie, may be personally liable for
12 the acts alleged in this Complaint pursuant to 47 U.S.C. § 217 of the TCPA, which reads, *inter*
13 *alia*:

14 [T]he act, omission, or failure of any officer, agent, or other person acting for or
15 employed by any common carrier or user, acting within the scope of his
16 employment, shall in every case be also deemed to be the act, omission, or failure
of such carrier or user as well as of that person.

17 See 47. U.S.C. § 217 (emphasis added).

18 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
19 the extent a response is required, denied.

20 16. Mr. Lurie personally participated in the actions complained of by (a) selecting
21 some of the phone numbers that would be called; (b) choosing any telemarketing call center that
22 it might have used; and (c) personally authorizing the telemarketing conduct of Triangular Media.

23 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
24 therefore is unable to admit or deny. To the extent a response is required, denied.

IV. FACTUAL ALLEGATIONS

A. Defendants made non-emergency calls to the cellular phones of Plaintiff and other consumers without their prior express written consent.

17. Plaintiff's telephone number, (XXX) XXX-9916, is assigned to a cellular telephone service.

ANSWER: Defendant lacks knowledge regarding the allegations in this paragraph and therefore is unable to admit or deny. To the extent a response is required, denied.

18. Plaintiff has not been a Hearing Help Express, Inc. customer or subscriber at any time and never consented to receive calls from Hearing Help Express, Inc., Leadcreations.com, Triangular Media, or Lewis Lurie.

ANSWER: Defendant lacks knowledge regarding the allegations in this paragraph and therefore is unable to admit or deny. By way of further response, Plaintiff's information was transmitted to Defendant from co-Defendants Triangular/LeadCreations. Triangular/LeadCreations were to only provide leads to Defendant who provided express consent to be called. Triangular and LeadCreations provided assurances to Defendant that Plaintiff had given his consent to be contacted by Defendant. Defendant reasonably believed only leads who provided consent to be called would be transmitted from Triangular/LeadCreations. To the extent a response is required, denied. The remaining allegations in this paragraph consist of legal conclusions to which no response is required. To the extent a response is required, denied.

19. In May and June of 2019, the Plaintiff received at least seven telemarketing calls from Leadcreations.com, Triangular Media, or a call center they commissioned.

ANSWER: Defendant lacks knowledge regarding the allegations in this paragraph and therefore is unable to admit or deny. To the extent a response is required, denied.

20. These calls occurred on May 21, 22, 23, 24 and June 4, 13, 2019.

1 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
2 therefore is unable to admit or deny. To the extent a response is required, denied.

3 21. All of the calls were made using the Caller ID (855) 255-8148.

4 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
5 therefore is unable to admit or deny. To the extent a response is required, denied.

6 22. During the call on June 13, 2019, Plaintiff was transferred and a prerecorded
7 message played. The prerecorded message played a series of recorded questions. Plaintiff
8 wanted to know who had been calling him so he answered the questions. At the end of the
9 message, a prerecorded question asked him if he agreed to receive automated calls about hearing
10 aids. The recording did not identify who would be calling him about hearing aids. Plaintiff
11 answered “no,” clearly indicating that he did not consent to receive calls.

12 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
13 therefore is unable to admit or deny. To the extent a response is required, denied.

14 23. On August 27, 2019, Hearing Help Express, Inc. called Plaintiff’s cellular phone
15 from the telephone number (630) 403-8617.

16 **ANSWER:** Defendant admits only that it placed a call to a phone number (XXX) XXX-9916.
17 The remaining allegations in this paragraph are denied.

18 24. On August 29, 2019, Hearing Help Express, Inc. again called Plaintiff’s cellular
19 phone from the telephone number (630) 403-8617.

20 **ANSWER:** Defendant admits only that it placed a call to a phone number (XXX) XXX-9916.
21 The remaining allegations in this paragraph are denied.

22 25. On September 4, 2019, Hearing Help Express, Inc. again called Plaintiff’s cellular
23 phone, this time from the telephone number (847) 748-0828.

1 **ANSWER:** Defendant admits only that it placed a call to a phone number (XXX) XXX-9916.
2 The remaining allegations in this paragraph are denied.

3 26. The September 4, 2019 call that the Plaintiff received from Hearing Help Express,
4 Inc. began with a pause.

5 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
6 therefore is unable to admit or deny. To the extent a response is required, denied.

7 27. During the calls that Plaintiff answered, an individual from Hearing Help Express,
8 Inc. promoted its hearing aid services and offered to sell them to the Plaintiff.

9 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
10 the extent a response is required, denied.

11 28. Plaintiff was not interested and had not requested information regarding those
12 products.

13 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
14 therefore is unable to admit or deny. By way of further response, Plaintiff's information was
15 transmitted to Defendant from co-Defendants Triangular/LeadCreations after he was asked a
16 series of questions to gauge his interest in hearing aid products and services. Plaintiff answered
17 both of those questions in the affirmative. Had Plaintiff not done so, his information would not
18 have been transferred to Defendant. To the extent a further response is required, denied.

19 **B. Defendants Used an ATDS.**

20 29. During at least the June 13, 2019 call, Triangular Media, Leadcreations.com, or a
21 call center they retained, called Plaintiff's cellular phone using an ATDS. Plaintiff noted a pause
22 before being connected to the call, which is characteristic of a call placed by an ATDS.
23
24
25
26

1 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
2 therefore is unable to admit or deny. To the extent a response is required, denied.

3 30. Furthermore, Plaintiff called back the telephone number that called him during all
4 of the calls, Caller ID (855) 255-8148, and received a message that stated, “The number you
5 have dialed is not in service.” This is also indicative that an ATDS is used, as the call was made
6 using a “spoofed” (made up) Caller ID number.

7 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
8 therefore is unable to admit or deny. To the extent a response is required, denied.

9 31. During the September 4, 2019 call, Hearing Help Express, Inc. called Plaintiff’s
10 cellular phone using an ATDS. Plaintiff noted a pause before being connected to the call, which
11 is characteristic of a call placed by an ATDS.

12 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
13 the extent a response is required, denied.

14 32. Hearing Help Express, Inc. is a division of IntriCon, with operations in the United
15 States, Asia and Europe. The scale of Hearing Help Express, Inc.’s business requires that it and
16 its agents use a sophisticated dialing system capable of storing phone numbers and dialing them
17 automatically, as well as delivering messages without requiring the involvement of human agents.

18 **ANSWER:** Defendant admits that it is wholly owned by IntriCon, Inc. The remaining
19 allegations in this paragraph consist of legal conclusions to which no response is required. To
20 the extent a response is required, denied.

21 33. The equipment used to call Plaintiff and others not only had the capacity to store
22 or produce telephone numbers to be called using a random or sequential number generator, but
23 was programmed to sequentially or randomly access stored telephone numbers to automatically
24 call such numbers for the calls that are the subject of this case. The equipment generated, and
25 then stored, a sequence of telephone numbers for calling, and then automatically called those
26

1 numbers. The calls were part of a campaign that made numerous phone calls in a short period of
2 time without human intervention.

3 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
4 the extent a response is required, denied.

5 34. In August of 2019, a former employee left the following review of working at
6 Hearing Health Express, Inc. on the website GlassDoor, entitled “Boiler room telemarketing for
7 hearing aid sales”:

8 The outbound sales operation is run like a boiler room. Cheap leads are loaded
9 into a dialer.... About 98% did not ask for information on hearing aids, so you
10 spend most of your day wasting your time talking to people who don’t even have
hearing loss.

11 See <https://www.glassdoor.com/Reviews/Hearing-Help-Express-Reviews-E2608089.htm> (Last
12 Visited September 24, 2019).

13 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
14 therefore is unable to admit or deny. To the extent a response is required, denied.

15 **C. Hearing Help is Vicariously Liable for Triangular Media and Leadcreation.com’s**
16 **Calling Conduct.**

17 35. Hearing Help hired Leadcreations.com and Triangular Media to originate new
18 business through telemarketing conduct.

19 **ANSWER:** Defendant admits that it retained Triangular/LeadCreations to generate customer
20 leads for Defendant. By way of further response, Triangular and LeadCreations provided
21 assurances to Defendant that all transferred leads, including Plaintiff, had given consent to be
22 contacted by Defendant. The remaining allegations in this paragraph consist of legal conclusions
23 to which no response is required. To the extent a response is required, denied.

24 36. Hearing Help accepted the benefits of Leadcreations.com and Triangular Media’s
25 illegal telemarketing by accepting leads called illegally and then attempting to sell Hearing
26 Help’s good and services to them.

1 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
2 the extent a response is required, denied.

3 37. Hearing Help also had absolute control over whether, and under what
4 circumstances, it would accept a lead.

5 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
6 the extent a response is required, denied.

7 38. Hearing Help knew (or reasonably should have known) that Leadcreations.com
8 and Triangular Media were violating the TCPA on its behalf and failed to take effective steps
9 within its power to force Triangular to cease that conduct.

10 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
11 the extent a response is required, denied.

12 39. In fact, Leadcreations.com and Triangular Media have previously settled
13 allegations that it violated the TCPA.

14 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
15 therefore is unable to admit or deny. To the extent a response is required, denied.

16 **D. Defendants' TCPA violations injured Plaintiff.**

17 40. During the relevant period, Plaintiff has carried his cellular phone with him at
18 most times so that he can be available to family and friends.

19 **ANSWER:** Defendant lacks knowledge regarding the allegations in this paragraph and
20 therefore is unable to admit or deny. To the extent a response is required, denied.

21 41. Defendants' calls invaded Plaintiff's privacy and intruded upon his right to
22 seclusion. The calls frustrated and upset Plaintiff by interrupting his daily life and wasting his
23 time.

1 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
 2 the extent a response is required, denied.

3 42. Defendants' calls intruded upon and occupied the capacity of Plaintiff's cellular
 4 phone and depleted the battery of Plaintiff's cellular phone. The calls temporarily seized and
 5 trespassed upon Plaintiff's use of his cellular phone, and caused him to divert attention away
 6 from other activities to address the calls.

7 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
 8 the extent a response is required, denied.

9 V. CLASS ACTION ALLEGATIONS

10 43. Plaintiff brings this lawsuit under Federal Rules of Civil Procedure Rules 23(a),
 11 (b)(2), and (b)(3) as a representative of the following classes:

12 Class 1:

13 All persons or entities within the United States who received, on or after October
 14 9, 2015, a non-emergency telephone call from or on behalf of Leadcreations.com
 or Triangular Media Corp promoting goods or services:

15 (i) to a cellular telephone number through the use of an automatic telephone
 16 dialing system or an artificial or prerecorded voice; or

17 (ii) to a cellular or residential telephone number that has been registered on the
 18 national Do Not Call Registry for at least 31 days and who received more than
 one such call within any twelve-month period.

19 Class 2:

20 All persons or entities within the United States who received, on or after October
 21 9, 2015, a non-emergency telephone call from or on behalf of Hearing Help
 Express, Inc., promoting goods or services:

22 (i) to a cellular telephone number through the use of an automatic telephone
 23 dialing system or an artificial or prerecorded voice; or

24 (ii) to a cellular or residential telephone number that has been registered on the
 25 national Do Not Call Registry for at least 31 days and who received more than
 26 one such call within any twelve-month period.

1 Plaintiff reserves the right to amend the class definition following an appropriate period of
2 discovery.

3 **ANSWER:** Defendant admits that Plaintiff seeks to certify proposed classes as defined above.
4 Defendant denies that any sort of classes exist and denies that Plaintiff is similarly situated to or
5 could properly represent the classes of individuals pled in this SAC. Defendant further denies
6 that this action meets the mandatory prerequisites for a class action, or that this case is
7 appropriate for class treatment.

8 44. Excluded from the Classes are Defendants, their employees, agents and assigns,
9 and any members of the judiciary to whom this case is assigned, their respective court staff, and
10 Plaintiff's counsel.

11 **ANSWER:** Defendant admits that Plaintiff seeks to certify proposed classes as defined above.
12 Defendant denies that any sort of classes exist and denies that Plaintiff is similarly situated to or
13 could properly represent the classes of individuals pled in this SAC. Defendant further denies
14 that this action meets the mandatory prerequisites for a class action, or that this case is
15 appropriate for class treatment.

16 45. Because auto-dialing equipment maintains records of each contact, members of
17 the above-defined Classes can be identified through Defendants' or their agents' records.

18 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
19 the extent a response is required, Defendant denies the allegations in this Paragraph, including
20 that the proposed members of the classes are identifiable. Defendant further denies that this
21 action meets the mandatory prerequisites for a class action, or that this case is appropriate for
22 class treatment.

23 **Numerosity**

24 46. At the time of filing, Plaintiff does not know the exact number members of
25 Classes. But the breadth of Hearing Help Express, Inc. operations indicates that Class Members
26

likely number in the hundreds or thousands, and are geographically disbursed throughout the country.

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in this Paragraph, including that the number of Class Members are in the hundreds or thousands. Defendant further denies that this action meets the mandatory prerequisites for a class action, or that this case is appropriate for class treatment.

47. The alleged size and geographic dispersal of the Classes makes joinder of all Class Members impracticable.

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in this Paragraph, including that the joinder of all Class Members is impracticable. Defendant further denies that this action meets the mandatory prerequisites for a class action, or that this case is appropriate for class treatment.

Commonality and Predominance

48. Common questions of law and fact exist with regard to each of the claims and predominate over questions affecting only individual Class members. Questions common to the Class include:

- a. Whether Hearing Help's dialing system(s) constitute an ATDS under the TCPA;
- b. Whether Leadcreations.com or Triangular Media's dialing system(s), or the dialing system(s) of call centers they retained, constitute an ATDS under the TCPA;
- c. Whether Hearing Help used an ATDS to place non-emergency calls to the cellular telephones of Plaintiff and Class members without their prior express written consent;

1 a. Whether Leadcreations.com or Triangular Media used an ATDS to place non-
2 emergency calls to the cellular telephones of Plaintiff and Class members without their prior
3 express written consent;

4 b. Whether Defendants placed calls to numbers on the National Do Not Call
5 Registry;

6 c. Whether Defendants' telephone calls were made knowingly or willfully;

7 d. Whether Hearing Help is vicariously liable for the conduct of Leadcreations.com
8 or Triangular Media Corp.

9 e. Whether Leadcreations.com is vicariously liable for the conduct of call centers it
10 retained;

11 f. Whether Triangular Media is vicariously liable of the conduct of call centers it
12 retained;

13 g. Whether Plaintiff and Class members were injured by receiving such calls; and

14 h. Whether Defendants should be enjoined from engaging in such conduct in the
15 future.

16 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
17 the extent a response is required, Defendant denies the allegations in this Paragraph, including
18 that common questions of law or fact exist to all members of the proposed classes. Defendant
19 further denies that this action meets the mandatory prerequisites for a class action, or that this
20 case is appropriate for class treatment.

21 Typicality

22 49. Plaintiff's claims are typical of the claims of the Classes, in that Plaintiff, like all
23 Class Members, has been injured by Defendants' uniform misconduct—the placement of calls to
24 telephones for non-emergency purposes without the prior written express consent of the called
25 parties.

1 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
 2 the extent a response is required, Defendant denies the allegations in this Paragraph, including
 3 that Plaintiff's claims are typical of the claims of the proposed classes and that the proposed
 4 classes have been injured by Defendant's "uniform misconduct" of placing calls for non-
 5 emergency purposes without the prior express consent of the called parties. Defendant further
 6 denies that this action meets the mandatory prerequisites for a class action, or that this case is
 7 appropriate for class treatment.

8 **Adequacy of Representation**

9 50. Plaintiff will fairly and adequately protect the interests of the Classes and is
 10 committed to the vigorous prosecution of this action. Plaintiff has retained counsel experienced
 11 in class action litigation and matters involving TCPA violations.

12 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
 13 the extent a response is required, Defendant denies the allegations in this Paragraph, including
 14 that Plaintiff will fairly and adequately protect the interest of the proposed classes or that he is an
 15 adequate representative of the proposed classes. Defendant further denies that this action meets
 16 the mandatory prerequisites for a class action, or that this case is appropriate for class treatment.

17 **Superiority**

18 51. A class action is superior to other available methods for the fair and efficient
 19 adjudication of this controversy. Because the amount of each individual claim is small relative
 20 to the complexity of the litigation, and because of Defendants' financial resources, Class
 21 members are unlikely to pursue legal redress individually for the violations detailed in this
 22 complaint. Class-wide damages are essential to induce Defendants to comply with federal law.
 23 Individualized litigation would significantly increase the delay and expense to all parties and to
 24 the Court and would create the potential for inconsistent and contradictory rulings. By contrast,
 25 a class action presents fewer management difficulties, allows claims to be heard which would
 26

otherwise go unheard because of the expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations in this Paragraph, including that a class action is superior to other available methods for the fair and efficient adjudication of this controversy, that class-wide damages are essential to induce Defendant to comply with federal law, and that individualized litigation would increase delay and expenses. Defendant further denies that this action meets the mandatory prerequisites for a class action, or that this case is appropriate for class treatment.

VI. FIRST CLAIM FOR RELIEF

Violation of § 227(b)(1) for calls made using an ATDS or artificial/prerecorded voice

52. Defendants violated 47 U.S.C. § 227(b)(1) by placing non-emergency calls, either directly or through the actions of others, using an automatic telephone dialing system or an artificial or prerecorded voice to cellular telephone numbers without the prior express written consent of the called party.

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, denied.

VII. SECOND CLAIM FOR RELIEF

Violation of § 227(c) for calls placed to numbers listed on the Do Not Call Registry

53. Defendants violated 47 U.S.C. § 227(c) by placing, either directly or through the actions of others, more than one telephone solicitation call within a 12-month period to telephone numbers that have been listed on the national Do Not Call Registry for at least 31 days.

1 **ANSWER:** This paragraph consists of legal conclusions to which no response is required. To
2 the extent a response is required, denied.

3 **VIII. PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff, individually and on behalf of the Class defined above,
5 respectfully requests that this Court:

6 A. Determine that the claims alleged herein may be maintained as a class action
7 under Federal Rule of Civil Procedure 23, and issue an order certifying the Class defined above
8 and appointing Plaintiff as the Class representative;

9 B. Award \$500 in statutory damages for each and every call that Defendants
10 negligently placed in violation of 47 U.S.C. § 227(b)(1) of the TCPA;

11 C. Award \$1,500 in statutory damages for each and every call that Defendants
12 willfully or knowingly placed in violation of 47 U.S.C. § 227(c)(5) of the TCPA;

13 D. Grant appropriate injunctive and declaratory relief, including, without limitation,
14 an order requiring Defendants to implement measures to stop future violations of the TCPA; and

15 E. Grant such further relief as the Court deems proper.

16 **ANSWER:** Defendant denies that Plaintiff is entitled to any of the relief prayed for in the
17 SAC.

18
19
20
21 * * *

AFFIRMATIVE DEFENSES

As for additional defenses to the Second Amended Complaint (“SAC”), and without assuming any burden of pleading or proof that would otherwise rest on Plaintiff, and reserving the right to amend this Answer to assert any additional defenses when, and if, in the course of its investigation, discovery, preparation for trial, or otherwise, it becomes appropriate to assert such defenses, Defendant alleges the following affirmative defenses.

FIRST AFFIRMATIVE DEFENSE

(Consent)

The SAC and the causes of action therein are barred to the extent that Plaintiff and members of any putative class provided Defendant Triangular Media Corp. (“Triangular”), Defendant LeadCreations.com, LLC (“LeadCreations”), or any third party not named in the SAC, with consent for the alleged calls, including, without limitation, “prior express consent” under the TCPA.

SECOND AFFIRMATIVE DEFENSE

(Unconstitutional Content-Based Restriction on Speech)

The TCPA’s prohibitions on calls made using an ATDS or an artificial or prerecorded voice contravene the First Amendment because they are content-based restrictions on speech.

THIRD AFFIRMATIVE DEFENSE

(Unconstitutional Vagueness and Overbreadth)

Interpretations of the TCPA upon which Plaintiff’s SAC is based are unconstitutionally vague and overbroad and thus violate the Due Process Clause of the Fifth Amendment to the United States Constitution, and the Due Process provisions of the Fourteenth Amendment to the United States Constitution.

FOURTH AFFIRMATIVE DEFENSE

(Excessive Penalties, Due Process)

The statutory penalties sought by Plaintiff and members of any putative class are excessive and thus violate the Due Process Clause of the United States Constitution, and the Due Process provision of the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

(Bad Faith/Unclean Hands)

Plaintiff and members of any putative class and their agents, if any, acted in bad faith and with unclean hands based on all relevant facts, law, and circumstances known by them. Accordingly, they are barred, in whole or in part, from any recovery in this action.

SIXTH AFFIRMATIVE DEFENSE

(No Duplicative Relief)

To the extent that any relief sought by Plaintiff and members of any putative class would be duplicative of relief sought by them in other lawsuits or demand letters, allowing for the possibility of multiple recoveries, such recovery is barred by the Fifth and Eighth Amendment to the United States Constitution.

SEVENTH AFFIRMATIVE DEFENSE

(Waiver and Estoppel)

Plaintiff and members of any putative class have waived their right to recover herein, in whole or in part, and/or their claims are barred by estoppel.

EIGHTH AFFIRMATIVE DEFENSE

(Comparative Fault)

Any damages sustained by Plaintiff or members of any putative class must be reduced in proportion to the wrongful or negligent conduct of persons or entities other than Defendant,

including third parties, under the principles of equitable allocation, recoupment, set-off, proportionate responsibility, and/or comparative fault.

NINTH AFFIRMATIVE DEFENSE

(Third-Party Acts/Lack of Vicarious Liability)

Any alleged injury or damage sustained by Plaintiff or members of any putative class were caused, in whole or in part, by the conduct of third parties (1) who were not acting as Defendant's agents, and/or (2) was not ratified by Defendant. Moreover, there is no vicarious liability as to Defendant for the acts of Triangular, LeadCreations, and/or other third parties not named in the SAC.

TENTH AFFIRMATIVE DEFENSE

(Indemnity and Contribution)

Defendant cannot be held liable for any of the alleged damages in the SAC pursuant to an indemnity and/or contribution agreement and/or pursuant to indemnity and/or contribution under common law.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to State a Claim)

The SAC and each purported cause of action therein fails to state a claim against Defendant upon which relief can be granted.

TWELFTH AFFIRMATIVE DEFENSE

(Lack of Article III Standing)

The Court lacks the necessary subject matter jurisdiction over the claims asserted by Plaintiff and members of any putative class because Plaintiff and members of any putative class have not alleged or suffered a particularized, concrete harm, fairly traceable to Defendant's alleged conduct, to satisfy Article III standing.

THIRTEENTH AFFIRMATIVE DEFENSE

(No Statutory Standing)

Plaintiff and members of any putative class are not within the “zone of interests” protected by the TCPA and thus lacks statutory standing to assert such claims against Defendant.

FOURTEENTH AFFIRMATIVE DEFENSE

(Good Faith and Reasonable Reliance)

Defendant at all times acted in good faith and within reasonable commercial standards as to the matters alleged in the SAC. Moreover, Defendant acted in good faith and reasonably relied on Triangular/LeadCreations, and any other lead generation vendor in their compliance with the TCPA in generating leads sold to Defendant. Triangular/LeadCreations, and all other lead generation vendors were to only provide leads to Defendant who provided express consent to be called. Triangular/LeadCreations and all other lead generation vendors provided assurances to Defendant that all leads transmitted to Hearing Help had given their express consent to be contacted by Defendant. Defendant reasonably believed only leads who provided consent to be called would be transmitted from Triangular/LeadCreations and the third-party lead generation vendors.

FIFTEENTH AFFIRMATIVE DEFENSE

(Substantial Compliance and Bona Fide Error)

Defendant has substantially complied with the requirements of the TCPA and qualifies for all exemptions and Safe Harbors provided by the TCPA and its corresponding regulations.

SIXTEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

To the extent Plaintiff’s alleged injuries or other alleged injuries of members of any putative class or causes of action arose prior to the applicable statutory periods, those claims are barred, in whole or in part, by the applicable statutes of limitations and/or statutes of repose.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Failure to Demand Discontinuance)

The claims alleged in the SAC are barred in that Plaintiff and members of any putative class failed to avail themselves of the right to demand discontinuance of allegedly unsolicited call(s).

EIGHTEENTH AFFIRMATIVE DEFENSE

(Established Business Relationship)

The claims alleged in the SAC are barred by the existence of the established business relationship exception to claims under the TCPA.

NINETEENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

To the extent Plaintiff and members of any putative class have suffered any damage as a result of the matters alleged in the SAC, they have failed to mitigate those damages and the claims therefore are barred, in whole or in part.

TWENTIETH AFFIRMATIVE DEFENSE

(Not Knowing or Willful)

Plaintiff and members of any putative class are precluded from any recovery from Defendant for a willful and knowing violation of the TCPA because any such violation (which Defendant denies occurred) would not have been willful or knowing.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Claims Barred by Other States' Laws)

Plaintiff's claims and claims of members of any putative class, may be barred by the various laws of the 50 states, including statutes, regulations and common laws related to the allegations of wrongdoing addressed by other state's laws.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Failure to Plead Basis for Class Certification)

Plaintiff has not pled an adequate basis for class certification and that class relief or certification is appropriate because the required elements of adequacy, commonality, typicality and preponderance are not present in the instant case.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Class Certification Cannot be Met)

The pre-requisites for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure cannot be met because, among other reasons, joinder of all members of any putative class is practicable; individual questions of fact and law predominate over common issues; Plaintiff's claims are not typical of the claims and/or defenses of other putative class members; Plaintiff is not an adequate representative for any putative class and Defendant possesses unique defenses against Plaintiff; and a class action is not superior to other available methods of fair and efficient adjudication of the controversy. In addition, the prerequisites for class certification cannot be met because the claims alleged, by their nature, raise factual issues of reliance, intent and other elements that cannot be addressed on a class basis. Furthermore, determining the members of the classes defined by Plaintiff would require individualized inquiries and essentially require mini-trials on whether each class member satisfied the definition of the classes.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Lack of Personal Jurisdiction – Non-Resident Putative Class Member(s))

The Court lacks personal jurisdiction over Defendant as to the claims of any non-resident putative class member(s). *See Bristol-Myers Squibb v. Super. Ct. of Calif.*, 137 S. Ct. 1773 (2017).

Reservation of Rights

Defendant reserves the right to raise additional affirmative defenses to which it may be entitled or which may be developed in the course of discovery, including additional unique affirmative defenses applicable to different putative class members of Plaintiff's proposed classes. Defendant reserves the right to assert such additional affirmative defenses as the need arises, insofar as class certification has not been granted and is not appropriate in this case.

PRAYER

WHEREFORE, Defendant denies that Plaintiff is entitled to any of the relief sought, and denies that a class can be certified here. Defendant respectfully requests that the Court:

1. Dismiss the SAC with prejudice and enter judgment for Defendant;
2. Dismiss the class claims;
3. Award Defendant its expenses incurred in defending this action; and
4. Grant such other and further relief as the Court deems just and proper.

DATED this 25th day of September, 2020.

VAN KAMPEN & CROWE PLLC

/s/ David E. Crowe

David E. Crowe, WSBA No. 43529
dcrowe@vkcclaw.com

BLANK ROME LLP

/s/ Nicole B. Metral

Ana Tagvoryan (admitted *pro hac vice*)
atagvoryan@BlankRome.com
Jeffrey Rosenthal (admitted *pro hac vice*)
Rosenthal-J@BlankRome.com
Nicole B. Metral (admitted *pro hac vice*)
nbmetral@blankrome.com

2029 Century Park East, 6th Floor
Los Angeles, CA 90067
Telephone: 424.239.3400
Facsimile: 424.239.3434

Attorneys for Defendant Hearing Help Express, Inc.

DEFENDANT HEARING HELP EXPRESS, INC.'S
ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFF'S SECOND AMENDED COMPLAINT - 25
No. 3:19-cv-05960-MJP
113461.00602/123824025v.2

VAN KAMPEN & CROWE PLLC
1001 Fourth Avenue, Suite 4050
Seattle, Washington 98154-1000
(206) 386-7353

CERTIFICATE OF SERVICE

I, Nicole Metral, hereby certify that on September 25th, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following

TERRELL MARSHALL LAW GROUP

Beth E. Terrell
Jennifer Rust Murray
Adrienne D. McEntee
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Phone: (206) 816-6603
BTerrell@terrellmarshall.com
JMurray@terrellmarshall.com
AMcentee@terrellmarshall.com

Attorneys for Plaintiff

PARONICH LAW, P.C.

Anthony I. Paronich
350 Lincoln Street, Suite 2400
Hingham, Massachusetts 22043
Phone: (617) 485-0018
Fax: (503) 318-8100
Anthony@paronichlaw.com

Attorney for Plaintiff

Carl J. Marquardt
LAW OFFICE OF CARL J. MARQUARDT, PLLC
1126 34th Avenue, Suite 311
Seattle, Washington 98122-5137
Telephone: (206) 388-4498
carl@cjmpllc.com

Edward Maldonado, Admitted Pro Hac Vice
Email: eam@maldonado-group.com
Email: awclerk@maldonado-group.com
MALDONADO LAW GROUP
2850 S. Douglas Road, Suite 303
Coral Gables, Florida 33134
Telephone: (305) 477-7580
eam@maldonado-group.com
awclerk@maldonado-group.com

Attorneys for Defendant Lewis Lurie

Signed at Los Angeles, California this 25th day of September 2020.

/s/ Nicole Metral
Nicole Metral

DEFENDANT HEARING HELP EXPRESS, INC.'S
ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFF'S SECOND AMENDED COMPLAINT - 26
No. 3:19-cv-05960-MJP
113461.00602/123824025v.2

VAN KAMPEN & CROWE PLLC
1001 Fourth Avenue, Suite 4050
Seattle, Washington 98154-1000
(206) 386-7353